

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



ORIGINAL  
WITH PROOF  
OF SERVICE

76-7314

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UNITED STATES COURT OF APPEALS

*for the*

**SECOND CIRCUIT**

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BANK FUR GEMEINWIRTSCHAFT AKTIENGESELLSCHAFT,

Plaintiff-Appellant-Appellee,

v.

AMTRACO CORPORATION,

Defendant-Appellee-Appellant.

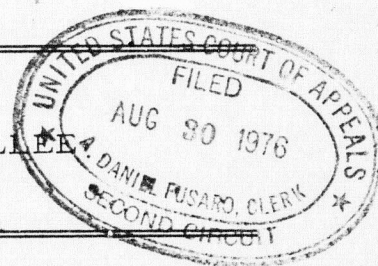
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ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AFTER TRIAL

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BRIEF FOR PLAINTIFF-APPELLANT-APPELLEE

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Murray on Contracts (2d Revised Edition 1974);

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Williston, Sales, Vol. 3 (4th Ed. 1974).

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Docket Number

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BANK FUR GEMEINWIRTSCHAFT AKTIENGESELLSCHAFT,  
Plaintiff-Appellant-Appellee,

v.

AMTRACO CORPORATION,  
Defendant-Appellee-Appellant,

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On appeal from a judgment of the  
United States District Court for  
the Southern District of New York  
after trial.

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### PRELIMINARY STATEMENT

This is an action by the Plaintiff-Appellant, Bank Fur Gemeinwirtschaft Aktiengesellschaft, a banking firm of Frankfurt in the Federal Republic of Germany (hereafter referred to as "BFG") brought in the United States District Court for the Southern District of New York against Amtraco Corporation, a New York Corporation (hereafter referred to as "Amtraco"), Defendant-Appellee and Cross-Appellant, to recover damages resulting from an alleged breach of contract by Amtraco for the purchase of a quantity of edible lactose (A 4-6 ).\* The action was tried in the District Court before the Hon. Whitman Knapp, without a jury, on July 7, 1975. On January 27, 1976, Judge Knapp filed a Memorandum and Order finding that Amtraco was liable under the contract and that BFG had suffered damages in the total amount of \$45,347.97 (A 144)\*\* After Amtraco's motion pursuant to Rules 52 and 59,

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Citation to the Joint Appendix will be by "A" followed by the page number of the Appendix; the Exhibits of both parties at trial are submitted under separate cover and will be referred to by their designation at trial; e.g., Plaintiff's Exhibit 1.

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Judge Knapp's Memorandum does not find a precise amount due to Plaintiff. A judgment in this amount pursuant to his Memorandum was noticed for settlement but never signed as defendant's motion pursuant to Rules 52 and 59, F.R.C.P. intervened.

Federal Rules of Civil Procedure, Judge Knapp filed an Amended Opinion on May 20, 1976, reaffirming that Amtraco had broken the contract but revoking the award of damages to BFG (A 159); On June 1, 1976, judgment to that effect was filed (A 166); BFG filed its appeal on June 30, 1976 (A 168); On July 6, 1976, Amtraco filed its cross-appeal (A 169).

STATEMENT OF THE ISSUES

1. Did the District Court err in its Amended Opinion by concluding that in respect to the burden of proof at trial there is no presumption of good faith and commercial reasonableness in favor of a seller of goods who resells after buyer's default pursuant to The New York Uniform Commercial Code, Article 2, §2-706?

2. Did the District Court err as a matter of fact in holding that plaintiff-appellant did not prove that it had resold the goods in a commercially-reasonable manner after the buyer's default?

3. Did the District Court err in failing to award incidental damages to plaintiff-appellant in spite of its conclusion that defendant-appellee had breached the contract between them and that plaintiff-appellant had acted in good faith and in a commercially-reasonable manner during the period from the breach until resales began?

## STATEMENT OF THE CASE

### A. THE DECISIONS OF THE TRIAL COURT

1. Liability: At trial Plaintiff established Defendant's liability based on the purchase confirmation dated September 30, 1971, (Plaintiff's Exhibit 1). It was clearly proven to the trial court's satisfaction that by the purchase confirmation Amtraco had purchased the goods (503.8 metric tons of edible lactose) for its own account, and not, as it contended, as BFG's agent for resale.\* In support of his conclusion that Amtraco purchased the goods for its own account, Judge Knapp isolated the following facts: that Plaintiff BFG through its agent, Molkerei J. A. Meggle, a German commodities merchant, agreed with Defendant Amtraco ("... an experienced commodities merchant in the business of buying and selling dairy products, including lactose...") to sell and deliver 503.8 metric tons of edible lactose; that Plaintiff would absorb storage costs until October 20, 1971, and Defendant would pay any custom's duties; that

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The judgment entered on June 1, 1976, provides in its first decretal paragraph that Defendant "...is deemed liable" to Plaintiff; BFG appeals from the second decretal paragraph which allows no damages. Amtraco has cross-appealed from the first decretal paragraph (A 168).

Defendant agreed to pay Plaintiff's agent, American Bank & Trust Company, \$95,722.00 as the purchase price, calculated at \$.19 per kilo; that the transaction as a whole was evidenced by a purchase confirmation dated September 30, 1971, prepared by Defendant; that Defendant accepted the goods on October 7, 1971, when title passed to Defendant by means of the transfer of the warehouse receipts and documents of chemical analysis; that the contract required Defendant to present the goods to Canadian customs and after passing Canadian inspection, to make payment to the American Bank & Trust Co.; that also on September 30, 1971, Defendant had negotiated a sale of the same goods to a Canadian purchaser; that thereafter Defendant never presented the goods to Canadian customs, never requested plaintiff to do so, and did not contend, or seek to prove, that the goods would have failed inspection (A 135-141).

The court therefore concluded that the goods' ability to pass Canadian customs was the only condition precedent to Defendant's obligation to pay, and that Amtraco waived that condition by its failure to present the goods for inspection (A 141). Defendant's failure to accept delivery of the goods made it liable to Plaintiff for non-payment (A 142).

Having thus concluded that Defendant was liable to Plaintiff for non-payment of the purchase price, the court turned to the question of damages. It should be noted, however, that the court made no finding as to the time of breach of the contract, except to allude to the date of transfer of title (October 7, 1971) and to Defendant "having failed to accept delivery of the goods." (A 142) There is no finding as to when Defendant failed to accept delivery.

2. Damages: The court in its first decision found that Plaintiff had suffered damages based upon Defendant's "unconditional offer of June 30, 1972, to purchase the entire lot without requiring Plaintiff to waive any of its claims" (A 143). The court found that offer (Defendant's Exhibit BBB) "clear evidence" of the value defendant placed on the goods, and together with evidence of the market price quotations being significantly below the contract price during the period "immediately after the breach" (without stating when the breach occurred), found that Plaintiff had been damaged to the extent of the difference between the Defendant's valuation of the goods (\$83,160) and the contract price (\$95,722.00) (A 144); also Plaintiff was awarded incidental damages for storage, service

fees and insurance costs, incurred up to June 30, 1972; that date was significant to the court as the date of an opportunity Plaintiff had to dispose of the lactose which the court found it had "no sound reason" to reject (A 144).

A judgment was prepared in accordance with Judge Knapp's Memorandum and Order, providing for total damages awarded to Plaintiff of \$45,347.97.

On February 26, 1976, Defendant moved pursuant to Rules 52 and 59 of the Federal Rules of Civil Procedure for amendment to the court's findings of fact and conclusions of law as embodied in its Memorandum and Order of January 26, 1976, on the ground that the court had erred in concluding as a matter of fact that the market price of the lactose after the breach of the contract was "significantly" less than the contract price (A 145-158). Plaintiff conceded that the court had erred in so finding but argued that the error was not material to the court's findings that other and incidental damages had been proven (A 162).

On May 20, 1976, the court filed an amended opinion citing the concession by Plaintiff that a factual error had been made in the Memorandum and Order of January 26, 1976, and concluded that Plaintiff could not recover any damages from Defendant, if in fact, the

market price of lactose had not been lower than the contract price after defendant's default (A 162). The evidence on this point (Defendant's Exhibit XXX and WWW) showed the market price to be higher than the contract price during the period immediately after the breach. The court concluded that no damages, not even incidental damages, were due Plaintiff because it had failed to satisfy its burden of proof that it tried to resell the goods in a commercially reasonable manner (A 162).

Accordingly, on June 1, 1976, judgment was entered finding liability for Plaintiff but denying damages in any amount; this appeal followed.

B. STATEMENT OF FACTS  
RELATING TO DAMAGES

Appellant appeals solely with respect to the district court's legal and factual conclusions on the issue of damages. The relevant facts concerning Plaintiff's damages are:

1. It is conceded that the court below erred in concluding originally that the market price of lactose was significantly lower during the post-breach period (A 162). However, such a finding does not address the question presented to the district court after trial as to whether Plaintiff's actual, total resale proceeds should be the basis of an award. Appellant demonstrated by the sales documents that it actually resold the goods, commencing in September 1972, and concluding in October 1973, and obtained total sales proceeds of \$80,402.18 (Plaintiff's Exhibits 4-11). The price per kilo on these sales varied between \$.19 and \$.17 per kilo. All sales were made by PTX Food Corporation, through its President Mr. Silverman, a "good businessman involved in the milk industry with good contacts all over the United States." (A 31).

2. Plaintiff showed by Exhibit 1 (the purchase confirmation) that Defendant agreed to buy the

lactose for \$95,722; and, of crucial importance, that Plaintiff agreed to carry storage charges only to October 20, 1971, and that thereafter storage charges should be Defendant's obligation.

3. PTX Food Corporation sold the lactose in various quantities from September 1972 until October 1973; Plaintiff's agent Meggle, by Hans Baumann, testified in his capacity as an experienced businessman in dairy products, including lactose, that such a method of resale would, in the market conditions then prevailing, obtain the best prices (A 31-34).

4. Plaintiff proved that it had incurred storage charges for the lactose from October 16, 1971, through September 15, 1974, in the total amount of \$56,699.92; after October 15, 1973 the storage charges became nominal (\$103.16 per month) (Plaintiff's Exhibit 5).

5. Plaintiff proved that it had incurred customs brokerage fees on resales in the total amount of \$5,924.14 (Exhibit 6); resale brokerage fees totaling \$4,560.80 (Exhibit 7); insurance costs in the total amount of \$2,305 (Exhibit 8-10); service charges of American Bank & Trust Co. in the total amount of \$1,239.82 (Exhibits 11 & 12).

From the evidence introduced at trial it was clearly established that Plaintiff began its resales of the goods in September 1972, after finally rejecting Defendant's offer of June 30, 1972 (Defendant's Exhibit BBB), and continued to incur storage charges and other charges as it disposed of the goods. Defendant, despite the clear term of the contract, never assumed storage charges, and Plaintiff paid them from the time of delivery, October 16, 1971, until the last resale.

In summary, the record at trial provides ample evidence of Plaintiff's damages, both on the resale price of the goods, and the incidental damages incurred before and during the resale process. The record also provides ample evidence that plaintiff's resale efforts were commercially reasonable.

## ARGUMENT

### POINT I

THE DISTRICT COURT ERRED IN CONCLUDING THAT APPELLANT FAILED TO MEET ITS BURDEN OF PROOF THAT RESALES OF THE GOODS WERE MADE IN GOOD FAITH AND IN A COMMERCIALLY REASONABLE MANNER

The law governing the measure of damages herein is found in The New York Uniform Commercial Code, Article 2.

§2-706 states in pertinent part:

(1) Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof.\* Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

§2-710 states:

Incidental damages to an aggrieved

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§2-703 provides Seller's Remedies in General and states in partial substance that where a buyer wrongfully rejects goods, or fails to make a payment due on or before delivery, the aggrieved seller, inter alia, may resell and recover damages as provided in §2-706.

seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

In its conclusions of law the district court draws a distinction between the seller's burden of proof with respect to mitigation under §2-706 and §2-708; §2-708 is held to "simply" restate common law, thereby allowing plaintiff a presumption of good faith and commercial reasonableness in its resale efforts, and placing on the defaulting buyer the burden of showing otherwise;\* §2-706 is found to provide "the more generous measure of damages" (presumably referring to recovery for incidental damages) and therefore to remove the probative aid of that presumption (A 162-163).

From this distinction the court reasons that no presumption attaches in this case to Plaintiff's activities and that Plaintiff must affirmatively demonstrate its good faith and commercial reasonableness in reselling.

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UCC §2-708 is entitled, "Seller's Damages for Non-Acceptance or Repudiation." It addresses itself only to the measure of damages, whereas §2-706 expressly sanctions resale as a remedy for seller and in no way provides for more damages; it is merely a more general antecedent to 2-708.

Appellant maintains that there is no basis for the distinction made by the District Court in the distribution of the burden of proof imposed by §2-706 and §2-708. §2-708, in fact, by its provision for recovering reasonable overhead could be said to be the more "generous" measure of damages; it provides for incidental damages in the same words as §2-706. The only authority cited by the District Court for its conclusion is Anderson, Uniform Commercial Code, Vol. 2 (2nd Ed. 1971) §706:8. That section of the treatise contains no analysis and says nothing about presumptions in favor of the seller; it merely affirms the conceded proposition that the seller has the burden. There is no analysis of the nature of the burden and the considerations for requiring the defaulting buyer to rebut a presumption of commercial reasonableness.

In fact Anderson states in a later section, referring to cases where title was technically passed to defaulting buyer, in words most appropriate to this case:

"There seems no reason, however, to impose a requirement of prompt sale on the seller, though there may be a limit to a right to prolong storage charges. But aside from such a claim, the seller is entitled, by virtue of his lien, merely to hold the goods, and it may frequently be reasonable to

hold them for a considerable time in the expectation of the buyer's ultimately taking them, and then, after it clearly appears that the buyer will not do so, to resell them; or conditions of the market may be such as to make an immediate sale unlikely to produce a fair price..." (at p. 385)\*

Plaintiff should be presumed to have resold the lactose in a commercially reasonable manner (§2-706(2) and (3)).\*\* Defendant at trial only raised an issue as to whether the method, manner, and time of resale were commercially reasonable. UCC §2-706(2) supra. As will be discussed below Defendant did not offer proof to support its defense of Plaintiff's commercial unreasonableness.

It is undisputed that Plaintiff as seller has the burden of proof as to what was "a commercially rea-

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See also, Williston Sales, Vol. 3 (4th Ed. 1974) §24-7; Murray on Contracts (2nd Revised Edition 1974) §§240-244; Peters, Remedies for Breach of Contract Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two, 73 Yale Law Journal 199, 258-259 (1963).

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Defendant in this action has raised no defense or claim, and has offered no proof, that it did not have notice of Plaintiff's intention to resell. In any event the exhibits and testimony amply demonstrate that Defendant was fully aware of Plaintiff's intention to resell in the event that Defendant did not relent in its refusal to accept the goods under the contract of September 30, 1971.

sonable manner" of resale §2-706(1). In proving that it has fulfilled its obligation as non-breaching party to mitigate its damages, Plaintiff must also prove its good faith and the commercial reasonableness of its mitigation efforts. However Plaintiff maintains that such proof is aided by an attaching presumption (which is rebuttable) that, in the absence of evidence to the contrary, its method and terms of resale were commercially reasonable. Wurlitzer Company v. Oliver, 344 F. Supp. 1009 (W.D. Pa. 1971)\* This presumption is well founded on the premise that businessmen in the ordinary course of conducting their business will seek to mitigate damages honestly and as profitably as possible; that they will seek to obtain the highest price on the best terms possible in the prevailing circumstances. Although not held to the highest standards of judgment as perceived in hindsight, they will be presumed to be exercising reasonable judgment under the circumstances known to them. The presumption of good faith and commercial reasonableness should attach to plaintiff's

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In Wurlitzer, the court held that the defendant had not raised sufficient proof to rebut the presumption that the seller had sold in good faith and "...for the purpose of realizing the greatest sum to be applied in mitigation." (at p. 1012).

resales in this case. In Wurlitzer, supra, the court distinguishes between the burden of proof as to good faith and commercial reasonableness and the extent of damages suffered by a reselling seller. Herein appears to lie part of the error of the district court below; there can be no doubt that Plaintiff proved the extent of its damages (Plaintiff's Exhibits 4-10); the district court appears to confuse proving damages and proving the commercial reasonableness of the resale.

The testimony of Hans Baumann provides proof by a preponderance of the evidence submitted by both sides, including Plaintiff's documentation of the manner and terms of resale (Plaintiff's Exhibits 4-10), that Plaintiff acted in a commercially reasonable manner as to all its elements; "method, manner, time, place and terms." UCC §2-706(2), supra.

As will be discussed below, Defendant offered no proof to rebut the presumption of reasonableness; nor did Defendant offer any proof to rebut Plaintiff's proof of the extent of its damages. The extent of the damages must, therefore, be accepted by this court as true; likewise, absent evidence by the Defendant to tip the preponderance of evidence its way, the Plaintiff has met its burden of proof on the issue of reasonableness. Wurlitzer v. Oliver, supra; see also American Broadcasting v.

American Mfrs. Co., 48 Misc.2nd 397, 265 NYS2nd 76,  
aff'd 24 A.D.2nd 851, 265 NYS2nd 577, aff'd 17 NY2nd  
849, 271 NYS2nd 284, cert. den 385 US 931, (1966);\*

As to the terms of resale in this case, there can be no question from the proof offered by both sides. All the lactose was resold at prices at least equal to the quoted market prices of Defendant's Exhibits WWW and XXX, and in most instances at a higher price. (Plaintiff's Exhibit 6). For reasons not apparent from the record, Defendant omitted proof of market prices for the period September 1972 through January 1973. Mr. Baumann having testified (with no rebuttal) that the market was depressed during the resale period, these prices obtained by Plaintiff as documented (Exhibit 6) emphatically prove that the best prices possible were obtained. They were also higher than the prices offered by Defendant in its last

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(In this case involving a contractual dispute over the sale of advertising time on TV, the court noted that the defendants had made no showing that there is a market, or market value for commercial television minutes in the same sense as there is for goods and commodities.) Judge Gellinoff in his decision after trial (Supreme Court, New York County) stated: "While the law imposes upon the party injured by a breach of contract the active duty of making reasonable exertions to render the injury as light as possible, the burden of proving that the damages sustained could have been prevented rests upon the party guilty of the breach (citations omitted)." (emphasis supplied)  
265 NYS2nd 76, at p. 88.

offer (Defendant's Exhibit BBB).

However, the central issue of this action with respect to damages raised by defendant is not whether the prices of resale were reasonable, but whether the time taken (part of the method and manner of resale) was commercially reasonable.

Mr. Baumann testified that in his expert opinion, given the circumstances of the lactose market in mid-1972, and the age of the lactose, its time in storage, and the United States domestic oversupply, the best method of resale would be sales in small lots over a course of some time (A 31-33).

Defendant submitted no evidence, either documentary or in the form of testimony, bearing on the question of commercial reasonableness under the circumstances of this case to refute Mr. Baumann's opinion that it was reasonable, and indeed advisable, to resell as plaintiff proceeded to do, even if it took a long time to do so. The test is simply whether Plaintiff acted in good faith and used his best judgment under the circumstances at the time. See Almy v. Simonson 52 Hun 535, 5 NYS 696 (1889); Cornell v. T. V. Development, 17 NY2d 69 268

NYS2d 29 (1966).

The district court in its Amended Opinion, footnote 3, reasons that placing the burden of rebutting a presumption of commercial reasonableness on Defendant would be inequitable because of a supposed "peculiar ability" of Defendant "to demonstrate the competence of Mr. Silverman." (A 165) However, it can hardly be argued that Defendant in this case would be "ill-equipped" to prove the facts relating to resale. The court's reasoning overlooks that Defendant could have readily discovered by appropriate pre-trial discovery whether there was any basis in fact for its only asserted defense that the goods were not sold in a commercially-reasonable manner; Mr. Silverman, who was not a party to this action, and not subject to Plaintiff's control, was as available to Defendant as to Plaintiff. It seems plain enough that Defendant could have called Mr. Silverman as a witness on the subject of his resale efforts and, if the facts were thus, easily borne its burden in asserting the defense of commercial unreasonableness.

It appears plain that Defendant elected not to call Mr. Silverman because the facts would not assist its defense. Therefore there is no inequity in requiring Defendant to assume this burden, and the district court's reasoning is erroneous.

The district court stated that "there is no evidence from him (Mr. Silverman) or anyone else as to what efforts he in fact made to resell the goods." (A 143-144) Such testimony was not necessary; it was also not necessary because the times and amounts of the various resales were documented and in evidence (Plaintiff's Exhibit 6), and Mr. Baumann testified as to Mr. Silverman's qualifications, experience in dairy products and the reason for making several smaller sales over an extended period of time (A 31-33). If the court had concluded on the evidence that the resale could have been more quickly accomplished, and that it was not commercially reasonable to take several months to sell 503 metric tons of lactose in 1972 and 1973, then, at least the court would have made the distinction between the two periods after Defendant's default on the contract, and fixed a time when it was commercially unreasonable for Plaintiff to continue to store the goods.

In considering the trial court's misapprehension of the evidence it is important to distinguish the

two periods of time after Defendant's refusal to accept the goods: the first period runs from the Plaintiff's transfer of title to the lactose to Defendant on October 7, 1971, to June 30, 1972, the date of Defendant's final "offer" to purchase the goods at a lower price than the original contract price (Defendant's Exhibit BBB); the second is the period of Plaintiff's resale efforts from June 30, 1972 through October 1973. During this second period there was no communication between the parties; during the first there was a continuous flow of communication, as Plaintiff tried to persuade Defendant to accept delivery as agreed on September 30, 1971, and Defendant made various different offers for the same goods in lesser amounts at different prices (Defendant's Exhibits S, Y, AA, OO, BBB).

In its Memorandum and Order of January 20, 1976, the court appeared to grasp the significance of the Plaintiff's telex of June 30, 1971, as the last date of contact between the parties, and concluded that Plaintiff should have sought to mitigate its damages on that occasion by accepting Defendant's offer even though it was lower than the original contract price (A 145). Implicitly, therefore, the court found that Plaintiff up to June 30, 1972 at least, had acted in a commercially

reasonable manner. It is a failing of the court's first decision that it does not articulate this implied finding; but it appears irrefutable from the court's language that it considered Plaintiff to be acting reasonably in all respects at least up to June 30, 1972. However, the court does not go further in its analysis, and there is no finding or conclusion made as to the commercial reasonableness of the resales themselves which take place during the second period, after Plaintiff's rejection of Defendant's last offer.

In its Amended Opinion, the court apparently lost sight of the underpinnings of its first decision, and no allusion at all is made to the "mitigation" offer of June 30, 1972. The court simply concluded that because the market price of lactose was in fact higher than the contract price during the immediate post breach period, Plaintiff was entitled to no damages at all, not even incidental damages. The significance of the Defendant's telex of June 30 as a "ceiling" on Defendant's liability for storage costs, service fees and insurance costs, is overlooked in the Amended Opinion. The contract term that after October 20, 1971, Defendant was to assume storage charges was evidently not considered; the other reasons supporting its findings and conclusions

of January 20, 1976, are ignored; i.e., the Defendant's offer of June 30, 1972, to purchase the same goods for a total of \$83,160, the conclusion that Plaintiff had an opportunity to dispose of the lactose on June 30, 1972, and mitigate its damages, principally storage costs. In sum, by its first decision the court realized that the difference between the market price and the contract price were merely one element of the total damages awarded. In the Amended Opinion the court focuses only on the fact that the post-breach market price was not lower than the contract price as originally supposed. The other elements of total damages suffered by Plaintiff is forgotten; This non-sequitur deprived Plaintiff of at least incidental damages, the most important of which are the storage charges. All this in the face of the Defendant's expressed storage cost obligation in the contract under which the court found Defendant liable for breach.

POINT II

THE COURT ERRED IN DENYING  
APPELLANT INCIDENTAL DAMAGES

The district court found Defendant liable under the purchase confirmation between the parties dated September 30, 1971 (Plaintiff's Exhibit 1). It necessarily follows from this that some damages incidental to the breach incurred by Plaintiff should be awarded to the extent they were proved. UCC §2-706(1) The only significant question in resolving this issue is whether Plaintiff acted in a commercially reasonable manner after the breach. However, the district court has made no finding as to when the Defendant actually revoked its acceptance of the goods, or as to how long it was commercially reasonable for Plaintiff to take in reselling the goods and for how long under the circumstances here Defendant could be charged with incidental costs. At the very least, under the contract and the trust receipt, Defendant should be liable for all incidental damages incurred by Plaintiff from October 20, 1971 to June 30, 1972, plus those incidental damages incurred by Plaintiff during such part of the later

period of resale as the trial court should determine to be commercially reasonable. The trial court never recognized the two distinct post-breach periods (as discussed supra) and therefore never reached this question. Illogically, in the Amended Opinion, the court deprived Plaintiff of all incidental damages awarded by his first decision, without changing the rationale. There was no reason to disallow storage and other charges in partially granting Defendant's motion pursuant to Rules 52 and 59, F.R.C.P.

The items of incidental damages which the court should have allowed Plaintiff herein for the entire period of resale were: storage charges (the contract shifts these to Defendant on October 20, 1971), insurance charges (pro-rated), brokerage fees, custom broker fees, and American Bank & Trust Company handling charges. Clearly these are allowable under UCC §2-706(1). Proctor & Gamble v. Lawrence American Field Warehousing Corp., 16 NY2nd 344, 266 NYS2nd 785 (1975); Neri v. Retail Marine Corporation, 334 NYS2nd 165, 30 NY2nd 393 (1972).\*

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In Neri the court held that a retail dealer was entitled to recover loss of profits and incidental damages upon the buyer's repudiation of a contract to purchase a boat, even though the boat was later sold for the same price that buyers had contracted to pay.

Incidental to Plaintiff's election of the remedy of resale were certainly insurance charges on perishable goods; to store such goods without insurance would have been grossly negligent and in dereliction of Plaintiff's duty to mitigate damages. If the goods had spoiled and had been unsaleable and had been uninsured, Defendant would have had the sound defense that Plaintiff's failure to insure precluded recovery against it.

Also, incidental to resale were the bank handling charges. Plaintiff as a foreign bank with no United States office at that time had to rely upon a domestic bank to complete the resale transaction for it. Such fees were clearly incidental extra costs flowing directly from Defendant's breach.

Customs brokerage fees are claimed because the lactose was imported and being stored under customs bonds; to release them to a Canadian buyer (as Defendant's simultaneous purchase and sale to a Canadian buyer would have accomplished) would have meant avoiding these charges. By reselling to the American market the customs duties and fees necessarily had to be paid by Plaintiff. They are therefore a valid item of incidental damages as Defendant's revocation forced an American resale of the goods.

Brokerage fees (those to Mr. Silverman of PTX) were also a reasonable expense incurred as a result of Defendant's default. Bache & Co. v. International Controls Corp., 339 F.Supp. 341 (SDNY, 1972).

All the above noted costs were incurred by Plaintiff incidental to the breach of the contract by Defendant and should have been the subject of an award of damages by the trial court. The extent of these damages were proven by documentary evidence (Plaintiff's Exhibits 5-11). It was clearly erroneous for the district court to hold that Plaintiff's failure to prove that the market price for lactose was lower immediately after the breach was also a failure to prove incidental damages. Williston's summary of the point is apposite:

"The seller's action for the price is the broadest of the money remedies which is made available to him under the Code. In the trial of his action, the failure of the seller to recover a contract price because he cannot prove those facts which would entitle him to a recovery does not preclude the possibility of recovering incidental damages under §2-710, or damages for the buyer's nonacceptance under §2-709(3)." Williston, Sales, Vol. 3 (4th Ed. 1974), §24-10.

CONCLUSION

The second decretal paragraph of the judgment of the district court should be vacated and the action should be remanded for findings as to the amount of damages incurred by Appellant, including incidental damages, as a result of Appellee's wrongful revocation of its acceptance of the goods.

Respectfully submitted,

FOX GLYNN & MELAMED  
Attorneys for Appellant  
Bank Fur Gemeinwirtschaft  
Aktiengesellschaft

Of counsel:

John R. Horan

STATE OF NEW YORK )  
COUNTY OF NEW YORK) ss.:

JEFF ELYSHEVITZ, being duly sworn,  
deposes and says that deponent is not a party to the action,  
is over 18 years of age and resides at  
90-1988th Ave. Woodhaven, N.Y. 11421.

That on the 30 day of AUGUST, 1976,  
deponent personally served the within BRIEF FOR  
PLAINTIFF-APPELLANT-APPELLEE  
upon the attorneys designated below who represent the  
indicated parties in this action and at the addresses below  
stated which are those that have been designated by said  
attorneys for that purpose.

By leaving 2 true copies of same with a duly  
authorized person at their designated office.

~~By depositing true copies of same enclosed  
in a postpaid properly addressed wrapper, in the post office  
or official depository under the exclusive care and custody  
of the United States post office department within the State  
of New York.~~

Names of attorneys served, together with the names  
of the clients represented and the attorneys' designated  
addresses.

LIEBMAN, EULAU, ROBINSON + PEARLMAN  
ATTORNEYS FOR DEFENDANT-APPELLEE-APPELLANT  
32 EAST 57<sup>th</sup> ST.  
NEW YORK, N.Y. 10022

Sworn to before me this

30 day of August, 1976

Jeff Elyshevitz

Michael DeSantis

MICHAEL DeSANTIS  
Notary Public, State of New York  
No. 009930908  
Qualified in Bronx County  
Commission Expires March 30, 1977